Harter Tomato Products Company *and* Cannery, Dried Fruit and Nut Workers' Union, Local 849, International Brotherhood of Teamsters, AFL–CIO. Case 20–CA–25555

August 14, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 8, 1995, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions for the additional reasons set forth below, and to adopt his recommended Order as modified.[1]

The judge found that the Respondent was a successor employer and that it violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. We agree. The primary issue before us, one that the judge failed to address explicitly in reaching this conclusion, is whether an employer that has not acquired substantial assets of the predecessor employer can be deemed a successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). We find that the direct transfer of assets to the successor is not a prerequisite to such status.

The parties stipulated the following facts. Harter, Inc. d/b/a Harter Pik'd Rite (Harter Inc.), the predecessor, owned and operated the Harter Canning & Packing Facility, where it engaged in the nonretail processing of industrial tomato paste, canned tomatoes, and canned peaches, and in prune processing. On July 12, 1993,[2] Harter Inc. sold the facility, realty, and operating equipment to a general partnership referred to as TLR. On July 16, TLR leased the facility to Harter Tomato Products Company (the Respondent), an unrelated company that had been incorporated on July 12.[3] The Respondent was not privy to the Harter Inc.-TLR sales agreement. The 4-year lease includes ''all easements, rights-of-way, licenses, permits . . . and fixtures . . . as well as the lessor-owned tangible equipment used in the operation of the tomato processing facilities,'' i.e., ''paste bins, pallets, machinery, tools and equipment, and furniture and fixtures used to process tomatoes.'' The facility is composed of a tomato paste processing plant, a currently nonoperational whole peeled tomato canning plant, a building in which peaches and prunes were processed, and a warehouse. Under the terms of the lease TLR retains the right to process peaches and other food products at the facility.[4]

The Respondent's sole business is the processing of tomatoes into paste. It commenced operations on the day the lease was executed, July 16. Of the 66 production and maintenance employees it employed as of July 26, 43 had formerly worked for Harter Inc. and had been represented by the Union. At the peak of the 1993 tomato season (July to October) the Respondent employed approximately 75 production and maintenance employees, of whom 50 were former Harter Inc. employees.[5] The Respondent employs seven individuals on its ''administrative team,'' who formerly worked in managerial and administrative positions at Harter Inc. Although the stipulation does not specify the number of the Respondent's tomato growers/suppliers, it indicates that almost all of the growers/suppliers for the 1993 season had previously done business with Harter Inc. Seven of the Respondent's twelve customers (i.e., tomato paste purchasers) in 1993 were previously customers of Harter Inc., and an eighth customer had purchased a company that had been a Harter Inc. customer. The Respondent contracted with the same trucking company that Harter Inc. used for the transportation of incoming crops from growers/suppliers. As with Harter Inc., the Respondent's tomato paste customers are responsible for the transportation of the finished product.[6] The Respondent took in 150,000 tons of tomatoes during the 1993 season and processed 48 million pounds of tomato paste.

[1] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] All dates are in 1993.

[3] Although the stipulation establishes that the Respondent, Harter Inc., and TLR are not commonly owned, it indicates that Harter Inc. managers sought to buy out the company but could not obtain the necessary financing. Harter Inc. managers met with the Respondent's sole owner, Chris Rufer, on July 11 and worked out a plan whereby he (i.e., the company he incorporated the following day) would lease the facility from the new owner and employ them. Rufer capitalized the Respondent using his personal assets and prepayments from anticipated customers.

[4] The peach pitting and repitting equipment and related electronic controls at the facility had been leased by TLR and Harter Inc. from Atlas Pacific. TLR recently returned that equipment to Atlas Pacific. TLR left the peach canning equipment in place and has offered it for sale. Additionally, TLR returned the prune pitters to Ashlock Company, the company from which they had been leased, and is selling the prune bins at the facility.

[5] Applicants for employment were told that the Respondent was setting its own terms and conditions of employment and that acceptance of any job offer meant acceptance of the new terms.

[6] The Respondent did not assume any of Harter Inc.'s contracts with suppliers, tomato paste purchasers, or trucking companies. Contracts with growers and purchasers, however, are entered into yearly—a practice that is an industry norm.

In the previous season, Harter Inc. had taken in 150,000 to 200,000 tons of tomatoes and processed 65.8 million pounds of tomato paste. The Respondent's volume of sales was $12.5 million for fiscal year 1993 (July 22 to June 30, 1994). Harter Inc.'s volume of sales for 1992 was $50–$55 million, of which $16–$17 million was derived from tomato paste sales.[7]

The Respondent utilizes the same production methods and equipment for the processing of tomato paste that Harter Inc. used. Additionally, the Respondent schedules a day shift, swing shift, and night shift as did Harter Inc., with employees in the same classifications or capacities.[8] Unlike Harter, Inc., the Respondent has grouped the employees on each shift into teams.[9]

Discussion

The Board has ''consistently held that a *mere change of employers or of ownership* in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.'' (Emphasis added.) *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972). The judge proceeded from the proposition that ''an employer generally succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a 'substantial and representative complement,' in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a 'substantial continuity' between the enterprises.'' *Hydrolines, Inc*., 305 NLRB 416, 421 (1991), citing *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), and *NLRB v. Burns Security Services*, above. Continuity is determined by analyzing ''whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.'' *Fall River Dyeing Corp*., supra at 43. The factors are to be assessed primarily from the perspective of the employees.

Typically, the question of successorship in Board cases has arisen in the context of two categories of cases: (1) those in which the employer has purchased all or part of the predecessor employer's business;[10] and (2) those in which the employer has succeeded the predecessor employer on a contract for the performance of services.[11] The existence of the second category of cases is an obvious indication that a successor's *ownership* of the predecessor's business, or its acquisition of all the predecessor's assets, is *not* crucial to the determination of a *Burns* successorship status.[12] When the employees work in the same plant using the same equipment and production processes, consideration of who technically owns the property used would not likely influence the employees' sense of continuity in the enterprises.

It is clear from the foregoing that the Respondent is a successor employer. Notwithstanding that the Respondent did not purchase the facility in issue from Harter Inc., it nevertheless leased the facility immediately after Harter Inc. sold it to TLR and hired a complement of employees, a majority of whom at all relevant times were former Harter Inc. employees. The Respondent is engaged in the processing and sale of tomato paste, an operation that accounted for approximately 25 percent of Harter Inc.'s 1992 total sales of fruits and vegetables—and 75 percent of Harter Inc.'s tomato paste sales. It uses the same production method and the identical equipment used by Harter Inc. in the production of tomato paste. Seven members of the Respondent's management and administrative team were employed by Harter Inc. in the same or similar capacities. Further, the Respondent's tomato suppliers previously supplied tomatoes to Harter Inc., and the majority of the Respondent's tomato paste customers were previously tomato paste customers of Harter Inc. The foregoing indicia of successorship make it immaterial that the Respondent is a lessee that does not stand in privity with the predecessor employer vis-a-vis the transfer of ownership of the facility.[13] The Re-

[7] The stipulation includes the observation that the Respondent's processing season, which began July 22, was shorter than the standard industry season, which begins in early July.

[8] The stipulation does not specify whether the Respondent's production employees perform the same jobs they did at Harter Inc., although it does indicate that Harter Inc. employees could and did perform various different jobs at their option.

[9] In light of the above facts on production and sales for the Respondent's tomato paste operations in comparison with the scope of Harter Inc.'s tomato paste operations, it appears that the scope of the Respondent's tomato paste operations were not dramatically different from those of Harter Inc.

[10] *Reliable Trailer & Body, Inc*., 295 NLRB 1013 (1989); *Stewart Granite Enterprises*, 255 NLRB 569 (1981).

[11] *Burns*; *Swanson Group, Inc*., 312 NLRB 184 (1993); *B & W Maintenance Service*, 203 NLRB 657 (1973).

[12] We note that under the Board's separate doctrine for remedial successorship liability under *Golden State Bottling Co*., 414 U.S. 168 (1973), there is a requirement that a conveyance occur or some other business relationship exist between the predecessor and successor employers. See *Glebe Electric, Inc*., 307 NLRB 883 (1992). This requirement is keyed to holding the remedial successor accountable for the predecessor's preexisting obligations as a result of the predecessor's unfair labor practices, a factor not present in *Burns* successorship cases.

[13] Even assuming, arguendo, that acquisition of substantial assets of the predecessor were to be required, the Respondent has *acquired*, through its lease through an intermediate entity, dominion and con-

spondent took over a distinct segment of Harter Inc.'s business, operating it in the same manner using the same equipment and the same employees, selling to many of the same customers, with no hiatus in operations. The Respondent, and only the Respondent, manufactures tomato paste at the facility, and although TLR retains the right to perform (or lease) the processing and packing of peaches, prunes, and canned tomatoes, the record does not indicate that it has done so or that it has exercised this right in a manner that would defeat the Respondent's status as a successor. In this connection, we find that *Pinter Bros., Inc*., 263 NLRB 723 (1982), on which the Respondent relies, is inapposite in that a majority of the successor's employees there had not previously been employed by the predecessor and a majority of the successor's customers had never been customers of the predecessor.

We note, too, that our findings in this case are not inconsistent with the court of appeals' decision in *CitiSteel USA v. NLRB*, 53 F.3d 350 (D.C. Cir. 1995), in which the court denied enforcement of the Board's order directing CitiSteel to recognize and bargain with the union.[14] The court held that the hiatus between the predecessor's closure of the steel mill and CitiSteel's reopening it, and substantial changes in operations ''tilt[ed] strongly against continuity'' and did not support a finding that CitiSteel was a successor employer.[15] The predecessor employer in that case closed in January 1987, and CitiSteel did not open until February 1989, after overcoming obstacles related to national security concerns, awaiting the passage of special legislation by the Delaware state legislature, and completing an extensive renovation of the mill—a hiatus of more than 2 years. When it reopened, it operated as a ''minimill'' that manufactured only a few types of steel, rather than remaining a specialty mill; production equipment was technologically advanced; job classifications were fewer and responsibilities increased, among other things. In contrast, as discussed above, the Respondent's tomato paste processing operation was the same as that of Harter Inc., and there was no hiatus in the tomato paste processing operation.

For these reasons, we find that the Respondent was a successor employer and that its refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.[16]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harter Tomato Products Company, Yuba City, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(b) and (c).

''(b) Within 14 days after service by the Region, post at its business facility located at Yuba City, California, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 11, 1993.

''(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.''

trol over—though not title to—a substantial segment of Harter Inc.'s plant and equipment used in the production of tomato paste.

[14] *CitiSteel USA*, 312 NLRB 815 (1993).

[15] 53 F.3d at 356. Interestingly, CitiSteel did not purchase the mill from the predecessor. A Hong Kong investor purchased it and assigned his interest in it to CITIC, an instrumentality of the People's Republic of China, that had created CitiSteel to operate the mill. There is no indication in the court's opinion that the lack of privity between the predecessor and CitiSteel would have been grounds for findings that the latter was not a successor.

[16] We agree with the judge that the RM petition and the employees' petition are tainted by the Respondent's unfair labor practice and are not reliable indicators of the employees' sentiments.

Margaret M. Dietz, Esq., for the General Counsel.
Mary E. Bruno, Esq., of Sacramento, California, for the Respondent.
Robert Bonsall, Esq., of Sacramento, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. On various dates in late September 1994, the parties executed a motion for receipt of stipulation of facts in lieu of hearing before administrative law judge. In relevant part, the (joint) motion reads as follows:

> 1. The Stipulation of Facts is executed by Respondent, the Charging Party, and Counsel for the General Counsel.

2. All parties herein agree to the submission into evidence of the pleadings and formal papers in this case, including the Complaint and Answer.

3. All parties herein agree that all essential and relevant material evidence necessary to dispose of the issues raised in the pleadings is contained in the Stipulation of Facts and exhibits, and agree to dispose with a verbatim written transcript of testimony in this proceeding.

4. All parties herein agree upon October 21, 1994, as the date for filing briefs to the Administrative Law Judge.

5. Receiving the attached Stipulation of Facts and exhibits in lieu of a hearing in this matter will avoid unnecessary costs and delay.

6. All parties waive their right to file exceptions to the findings of fact, but not to the conclusions of law or recommended order, of the Administrative Law Judge's decision.

7. The Stipulation of Facts is made without prejudice to any objection that any party may have as to relevance, materiality or competency of any facts stated therein, all of which objections are reserved.

On October 11, 1994, Deputy Chief Administrative Law Judge Earldean V. S. Robbins granted the parties joint motion and assigned the case to the undersigned by document captioned ''Order Receiving Stipulated Record, Assigning Administrative Law Judge and Setting Date for Filing Briefs.''

The complaint was issued on October 20[1] and alleges that Respondent has engaged in certain violations of Section 8(a)(1) and (5) of the Act. Based on the allegations of the complaint, the primary issues are whether Harter Inc. d/b/a Harter Pik'd Rite, by virtue of its membership in an employer's association (California Processors, Inc.) formerly had a collective-bargaining relationship with Cannery, Dried Fruit and Nut Workers' Union, Local 849, International Brotherhood of Teamsters, AFL–CIO (the Union), and if so, whether Respondent is a successor to Harter, Inc. in a manner which binds Respondent to the preexisting collective-bargaining relationship, and if Respondent is so bound, whether it violated the Act by failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of a certain unit of employees described at paragraph 6(e) of the complaint as:

> All employees covered by the terms of the collective-bargaining agreement between the California processors, Inc. and the Teamsters California State Council of Cannery and Food Processing Unions, International Brotherhood of Teamsters, which is in effect by its terms from July 1, 1991, to June 30, 1994.

Briefs in this case were submitted on a timely basis by the General Counsel and by Respondent.

I. FINDINGS OF FACT

The parties have prepared and jointly executed a 20-page stipulation of facts, dated July 27, 1994, and submitted to me with the stipulated record. Based on this document, I note that the parties agree, page 3, paragraph 2.4, and I find that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). I further note that the parties agree and I find that for all times material to this case Cannery, Dried Fruit and Nut Workers' Union, Local 849 (the Union), Cannery Workers and Warehousemen Local No. 857, affiliated with the International Brotherhood of Teamsters, AFL–CIO (Local 857), and the Teamsters California State Council of Cannery and Food Processing Unions, International Brotherhood of Teamsters, AFL–CIO (the IBT Council) are all labor organizations within the meaning of Section 2(5) of the Act.[2]

At all material times both the Union and Local 857 have been affiliated with the IBT Council and have authorized the IBT Council to represent them in negotiating and administering collective-bargaining agreements with the multiemployer association, CPI. On February 1, 1994, the Union merged with Local 857.

California Processors, Inc. (CPI) is a multiemployer association composed of various employers engaged in processing of fruits, vegetables, and related products, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the IBT Council.

Harter, Inc. d/b/a Pik'd Rite was an employer-member of CPI and authorized the multiemployer association to represent it in negotiating and administering collective-bargaining agreements with the IBT Council.

CPI and the IBT Council entered into a series of collective-bargaining agreements, the most recent of which was effective for the term July 1, 1991, to June 30, 1994, a copy of which is attached as exhibit C-1 (omitted from publication). Harter, Inc. was bound to the terms of 1991–1994 collective-bargaining agreement between CPI and IBT Council. During negotiations for the 1991–1994 contract Harter, Inc. was represented at the bargaining between CPI and IBT Council by Gerald Allen Harter Jr.

The CPI/IBT Council/multiemployer bargaining unit has approximately 14,000 employee-members. The job classification for the fruit, vegetable, and related products processing industry of California which are covered by the collective-bargaining agreement between CPI and IBT Council are set forth in appendix A of that agreement. A copy of appendix A is attached as exhibit C-2 of this stipulation (omitted from publication).

Respondent has never been an employer-member of CPI and has not delegated any bargaining authority to the multiemployer association to bargain on its behalf with the IBT Council, the Union, or any other labor organization.

Respondent is not signatory to or in any way bound by a collective-bargaining agreement with the Union and/or between the IBT Council and any multiemployer association, including CPI.

[1] All dates herein refer to 1993 unless otherwise indicated.

[2] The IBT Council is an association composed of various labor organizations, including the Union, and Local 857, and exists for the purpose of representing these constituent labor organizations in bargaining collectively and dealing with employers, including California Processors, Inc. (CPI), concerning grievances, labor disputes, and terms and conditions of employment.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

1. Background on Harter, Inc. and Respondent

a. *Harter, Inc.*

Beginning some time prior to July 12, Harter, Inc. d/b/a Harter Pik'd Rite, a Delaware corporation, owned and operated the Harter Canning & Packing Facility located in Yuba City, California. Harter, Inc.'s business consisted of nonretail processing of industrial tomato paste, canned whole tomatoes, canned peaches and the processing of prunes, and the marketing and sale of strawberries packed by an apparent related entity in Oxnard, California, and an apparent unrelated entity located in Watsonville, California.

On or about July 12, Harter, Inc. sold the real property and operating assets comprising Harter Canning & Packing Facility to Richland Ranches, Ltd. of California and to Tut Brothers Farms, a California general partnership. At the present time, the two entities mentioned above and a third, Lomo Cold Storage, hold substantial ownership interests in the real property and operating equipment of Harter Company & Packing Facility as tenants-in-common.

These entities are referred to collectively as the lessor and/or the current owner or ''TLR.''

b. *Harter Tomato Products Company*

Meanwhile, also on July 12, Harter Tomato Products Company (Respondent) was incorporated with an office and place of business in Yuba City, California. On or about July 16, Respondent commenced operations in the nonretail business of processing tomatoes into tomato paste.

On July 16, Respondent, which was not privy to the negotiations nor the ultimate terms of the purchase and sale agreement between Harter, Inc. and TLR, leased from TLR the Harter Canning & Packing Facility site (32 acres) including all buildings, fixtures, and lessor-owned tangible operating equipment used in the operation of the tomato-processing facilities. The term of the lease ends on December 31, 1997, and the rent for all real and personal property included in the transaction is $640,000 per year.

Pursuant to the terms of the lease agreement (exh. B to stipulation of facts) TLR has retained the ability and right to process peaches and/or other food products at the Harter Canning & Packaging Facility. The peach season lasts from July through September but the peach canning equipment is now being offered for sale by TLR. The machinery and equipment used by Respondent to produce tomato paste is the same machinery and equipment used by Harter, Inc. to produce tomato paste. One difference is that Harter, Inc. owned the machinery and equipment while Respondent leases it from TLR. Pursuant to the lease referred to above, Respondent was given license to use the ''Harter'' name as a corporate name, although no member of the Harter family has owned the Harter Canning & Packing Facility since 1969.

2. Respondent's owner and its administrative team

a. *Chris Rufer*

Chris Rufer, Respondent's president, owns all shares of Respondent and initially financed Respondent with personal funds and through prepayment of contracts with Respondent's customers for industrial tomato paste to be produced during the 1993 season. On July 11, Rufer met for the first time with representatives of the lessors. Rufer has no ownership interest nor any other affiliation with or investments in any of the former or current owners of Harter Canning & Packing Facility, including but not limited to TLR and Harter, Inc. d/b/a Harter Pik'd Rite. Pursuant to Respondent's personnel policies, Rufer, as president, determines labor relations matters. However, through a team management concept (exh. G), all employees are allowed input into job assignments and scheduling. Under the team management concept, each shift is considered a team, the members of which agree among themselves about the frequency of rotation of job assignments, rotation of shifts, and staffing (number of persons needed on a particular job).

b. *Gerald Allen Harter, Todd Harter, Wayne Miller, Todd Crow, Laura Dominguez, Liz Haag, and Ellie Betancourt*

All persons named above are currently employed by Respondent and assigned to duties as its administrative team. Dominguez, in particular, handles Respondent's timecards, personnel and payroll records. They have no ownership interest in nor are they officers of Respondent.

All persons named above were formerly employed by Harter, Inc. as follows: G. Harter as general manager and vice president; T. Harter as quality control production manager; Miller as plant manager of the tomato paste and whole-peeled tomato processing operations; Crow as chief financial officer; and Dominguez, Haag, and Betancourt in the personnel department. While employed by Harter, Inc., none had any ownership interest nor other affiliation with any of the former or current owners of the Harter Canning & Packing Facility, including but not limited to TLR and Harter, Inc. d/b/a Harter Pik'd Rite. All seven were terminated by Harter, Inc. on July 9, 1993.

3. Harter, Inc. employees

Although the tomato season lasts from the beginning of July until October, Harter, Inc. essentially ceased all processing of any new crops from the 1993 growing season as of July 9, when Harter, Inc. d/b/a Pik'd Rite terminated 50 of its total hourly and other employees. Forty other of Harter, Inc.'s hourly and other employees were kept on to finish processing prunes and labeling canned goods from the 1992 season and to ship peaches, prunes, and drums and Scholle bins of tomato paste until some time in September.

Pursuant to the purchase and sale arrangement between TLR and Harter, Inc., approximately 30 to 40 Harter, Inc. employees were allowed to remain on the premises of the Harter Canning & Packing Facility to finish the processing of the prune crop and to ship tomato paste and case goods from its old inventory.

As of September 3, Harter, Inc.'s remaining hourly employees completed the work and vacated the premises.

Respondent assumed no responsibility for the removal of the inventory nor did it have any ownership or other financial interest in that inventory.

The job classifications that appear in appendix A of the collective-bargaining agreement, applicable to Harter, Inc.'s peach, prune, whole-canned tomato, and industrial tomato paste operations are contained in exhibit I. At the peak of the 1992 season, Harter, Inc. d/b/a Harter Pik'd Rite employed between 950 and 1000 production and maintenance (P & M) employees and had approximately 1200 P & M employees on its employee list, including casual employees for its combined operations. Of these employees, approximately 25 percent were in brackets I, II or III and approximately 75 percent were in brackets IV or V. More specifically, persons were employed in the tomato paste operation as follows: 4 sorters per shift (bracket V); 1 bulk unloader per shift (not specifically described in appendix A list of classification); 5 cleanup workers per shift (brackets V or IV); 1 hot break pulper and finish operator per shift (not specifically described in appendix A, but described in stipulation (par. 12.3) (bracket III-A); 3 drum filler operators per shift (class B, bracket III); 2–3 drum weighers per shift (not specifically described in appendix A, but listed in stipulation as bracket IV); 2 forklift operators per shift (class B, bracket III); 1 head mechanic or boiler room attendant per shift (bracket I-AA or bracket I-B); 1 employee per shift (2 on days) for quality control (bracket I or III); 1 electrician and 1 mechanic per shift (bracket I-B); 1 vacuum pan operator per shift (bracket I); 1 vacuum pan mechanic per shift (not specifically descried in appendix A); 1 crew leader per shift (bracket III) Respondent has no comparable position; no bargaining unit employees were classified as tractor operators or performed tasks in irrigation or effluent operations. Instead this work was done by Harter, Inc. agricultural employees; 2 raw product grader (bracket III)—Respondent has State of California inspector informing this job; 2 forklift operators and 2 assistants, day shift only (bracket III or II (operators), IV (assistants)).

Pursuant to the collective-bargaining agreement, Harter, Inc. hourly employees were paid every Friday (during the 1993 season, Respondent's hourly employees were paid every Thursday and during the 1994 season, Respondent's hourly employees will be paid biweekly). Harter, Inc.'s P & M employees' wages, hours, working conditions, fringe benefits, and other terms and conditions of employment are included in the collective-bargaining agreement (exh. C-1) (Respondent's hourly employees have their fringe benefits specified in its policy guidelines (exh. G). All of Respondent's employees have medical coverage, year-round employees through Fortis Benefits, and seasonal employees through F & H Medical Trust).

Although Harter, Inc. employees did not rotate jobs as a regular practice, during downtime due to a breakdown or other unexpected temporary production interruption, the employees filled in doing cleanup work in their immediate work areas. This was particularly true of the unloaders who had downtime between truckloads of tomatoes. In addition, cleanup workers as well as any other bracket V or IV classification of employees relieved sorters for lunch and breaks. Because unloading was a task requiring physical strength, sorters, who tended to be females, often older females, did not do any relief work for unloading. Bulk unloaders were relieved for breaks by cleanup workers and the crew leader, or occasionally by a mechanic. With respect to the three drum weighers assigned to a shift, one spent the first 1-1/2 hours of the shift sweeping in the packaging areas and spent the remainder of the shift relieving the other two drum fillers and assembling bins. The vacuum pan mechanic relieved the vacuum pan operator.

4. Respondent's employees

Prior to the taking of applications for employment which began on July 17, Respondent established its wages, hours, and working conditions and conditioned all offers of employment upon acceptance of these working conditions. Between July 17 and 27, Respondent received 1842 applications for employment (exh. E, sample application). Of these, 1406 applications were for sorter/cleanup jobs (H-1 and H-3 job descriptions), 200 for forklift operator positions (H-7 job description), and 157 for technical and specialized positions (H-8–13). Between July 17 and 22, Respondent extended 79 offers of employment (exh. F) which were conditioned upon passing a drug screening and acceptance of Respondent's personnel policies (exh. G). Of the 79 persons receiving offers, 4 individuals rejected theirs.

When most former employees of Harter, Inc. came to work for Respondent, they had been terminated from their former jobs. Respondent was unaware of any of its employees still working for Harter, Inc. when they were hired by Respondent. Respondent did not hire any former Harter, Inc. employees by seniority nor did Respondent recognize nor apply seniority for any purpose when it hired Harter, Inc.'s former employees, nor did Respondent recognize Harter, Inc.'s accrued vacation or any other benefits for Harter, Inc.'s former employees whom it hired.

Respondent has a completely separate tax identification number, bank, bank account, telephone numbers, financial books, accountants, and insurance policies from those of Harter, Inc.

On July 22, Respondent began processing tomato paste, the only product it currently plans to process, and its sole product for the 1993 season. Utilizing 56 hourly P & M employees on three shifts, Respondent would normally have begun the tomato-processing season earlier in July, but was delayed in this instance due to the failed management buyout and last minute formation of Respondent.[3]

At the peak of the 1993 season, Respondent employed on three shifts, a complement of approximately 70 to 75 hourly P&M employees in the tomato paste operation, some of whom were employed as regular, full-time, year-round employees, and the remainder as regular, full-time, seasonal employees. Of the approximately 70–75 hourly P & M employees, about 50 were formerly employed by Harter, Inc. and were represented by the Union.

After the tomato season ended, Respondent retained approximately 16 employees on a year-round basis for which 7 were regular, full-time, nonseasonal hourly employees who performed work in the technical operations, 2 worked in shipping, 3 performed clerical tasks on the administrative

[3] The unsuccessful management buyout is more fully explained in Sec. 7 below.

team, and 4 were exempt, salaried, administrative team employees.

Each of Respondent's three shift teams is made up of four smaller teams which are grouped by task/function performed in the tomato paste operation: (1) juice preparation; (2) product packaging; (3) technical operations; and (4) effluent operations.

Respondent's juice preparation team unloads and sorts tomatoes, maintains the facility in a sanitary condition, and coordinates the flow of tomatoes and juice (exhs. H-1–4). Except for sorters, the other employees are all cross-trained to perform the jobs listed above and are paid $13 per hour.

The tomato sorters, considered the least skilled labor, number three employees per shift and are paid $8.50 per hour.

The product packaging team operates the filling equipment, straps bins/drums, helps with filling and weighing bins/drums, and operates forklifts (exhs. H-5–7). Paid $13 per hour, the employees rotate not only among the jobs in the product packaging area, but also with the juice preparation employees.

The technical operations team conducts boiler operations ($18–$20 per hour), quality control ($13–$14 per hour), mechanical and electrical operations ($18–$20 per hour), evaporative ($16–$19.50 per hour), and aseptic operations ($21 per hour) (exhs. H-8–H-12).

The effluent operations team performs effluent operations, flood irrigation and tractor operations ($13 per hour) (exh. H-13). The two employees who perform this work (one on day shift, one on swing shift) also work on occasion in either product packaging or juice preparation.

5. Tomato paste process[4]

Tomatoes are delivered to the paste plant by a trucking contractor. They are then unloaded, sorted, and chopped up. Eventually the tomato product is transferred into juice tanks and after a series of treatments and operations, is transformed into a paste. Subsequent operations of a mechanical, electrical, sanitary, boiler operation and quality control occur before the process is complete (exh. D).

6. Employee training and related facts

At both Harter, Inc. and Respondent, all jobs had government-mandated safety hazard training both as to hazards which exist throughout the plant for all jobs and as to specific hazards which relate to a particular job location for individual employees.

At Harter, Inc., tasks classified in the collective-bargaining agreement as bracket V, sorter, cleanup worker–class B, or bracket IV, cleanup worker–class A, and bulk unloader were considered unskilled tasks which required minimal amounts of training as to the performance of the job task itself, in addition to the safety training required with respect to the job hazards. For example, sorters required only 5–10 minutes of training to perform their jobs, cleanup workers required about 30 minutes, a bulk unloader requires 4–8 hours, and a drum weigher requires about a half day.

In the paste plant at Harter, Inc., tasks classified as bracket III or above such as hot break pulper and finisher (bracket III-A), drum filler operator (bracket III), forklift operator (bracket III), crew leader (bracket III), mechanics and electricians (bracket I-B), boiler operator (bracket I-AA), and certain other positions were considered to be skilled tasks which required moderate to substantial amounts of training. For example, basic training on the forklift took several weeks, to several months in order to do high piling. Vacuum pan operations required about 1 year of training and electricians received 4000 hours of training (per the collective-bargaining agreement).

With respect to filling in for unexpected absences, Harter, Inc. maintained a ''qualified list'' for each job classification, including sorter, meaning that employees had previously received the safety training and task training for the position. Thus Harter, Inc. filled temporary vacancies by offering reassignment to the most senior qualified employee on the list who had not waived working the available classification. Brackets IV and V positions were assigned by seniority rather than bid. Seniority was on a companywide basis, i.e., an employee could be moved from the paste plant to the prune-processing operation. Any reassigned employee always received the highest bracket rate of pay.

Employees desiring jobs classified in the collective-bargaining agreements under brackets III, II, and I, bid for these jobs. Unexpected absences for these jobs were normally filled either by asking the employee from the prior shift to work overtime or by asking the employee from the next shift to come in early. When these employees were not available, the position was filled by the most senior available employee who had previously established the qualifications to perform the task. Any such employee had to be task trained and safety trained specifically for the job in question and be on the bid list for the particular position.

Harter, Inc. maintained five departments: peach, prune, paste, whole tomato, and LCL (label case and load). Once a week, qualified employees could use their seniority to transfer between departments. The company also had the right to transfer qualified employees between departments, provided they had seniority, when it was necessary to fill positions anywhere in the entire operation, including peaches, prunes, and whole-peeled tomatoes.

7. Growers

Harter, Inc. had a stable group of approximately 15 growers with whom it contracted for tomatoes. In the tomato industry, contracts between growers and processors are for one growing season. Although Harter, Inc. did not contract with growers for the 1993 season, Gerald Allen Harter Jr. made oral contracts with growers with whom he had been dealing for many years. In making these oral contracts, Harter Jr. acted in anticipation of a management buyout of the company from Harter, Inc. However, when the management group (which included Harter Jr.) could not secure financing for a management buyout of Harter, Inc., Harter Jr. contacted Rufer who acting on behalf of Respondent, entered into his own contracts with almost all of the same growers who had agreed to grow crops for the management buyout group for the 1993 season.

Currently, Respondent has contracts with growers and suppliers throughout California and their terms differ from those Harter, Inc. had with its growers. Respondent did not assume any contracts between Harter, Inc. and any growers.

[4] The process used by Respondent is the same as used by Harter, Inc.

8. Transportation

Harter, Inc. had contracted with ATL Trucking, Inc. for the transportation of incoming crops to the Harter Canning & Packing Facility. During the 1992 season Harter, Inc. also contracted with ATL Trucking, Inc. for the transportation of some finished peach products, whole-peeled tomato products, and prunes. The industrial tomato paste customers were responsible for their own transportation from Harter, Inc.

For the 1993 season, Respondent contracted with ATL for the transportation of incoming crops.[5] Although Respondent did not assume the contract of Harter, Inc., the basic terms of its contract with ATL do not differ from previous contracts between Harter, Inc. and ATL, except that an arbitration clause was added, and ATL took over responsibility for the scale house. ATL hired one weigher for each of the three shifts, which weighers had previously been employed by Harter, Inc., to weigh the incoming trucks full of tomatoes on a truck scale. When employed by Harter, Inc., the three weighers were covered by the CPI/IBT Council contract in the classification called ''Weigher-Class B'' which was a bracket III position contained in appendix A of the CPI/IBT Council contract (exh. C-2) paying $11.79 per hour.

During the 1994 season, Respondent will contract with Morning Star Trucking, Inc., a company owned by Rufer and used by Morning Star Packing Co., a separate company also owned by Rufer and located in Los Banos, California.

9. Production

During the 1992 season, Harter, Inc. took in approximately 150,000–200,000 tons of tomatoes of which 15 percent were processed into whole-peeled tomatoes and the balance was processed into 65,803,000 pounds of finished tomato paste. The number of pounds of paste that a ton of tomatoes will yield varies depending on the juice and solid content of the tomatoes.

During the 1993 season, Respondent took in approximately 150,000 tons of tomatoes all of which were processed into 48 million pounds of finished tomato paste. Respondent produced no peeled canned tomatoes, canned peaches, or processed prunes during the 1993 season.

10. Sales

On an annual basis, Harter, Inc. d/b/a Harter Pik'd Rite had a total of $50–$55 million in sales: (1) peaches—$22 million; (2) strawberries—$6–$7 million; (3) whole-Peeled, Canned Tomatoes—$3–$4 million; (4) prunes—$2–$3 million; and (5) tomato Paste—$16–$17 million during the 1991 and 1992 calendar years, respectively.

In the fiscal year of 1993 (July 22–June 30, 1994), Respondent had a sales volume of $12.5 million. The sales volume was lower in 1993 because of lower commodity prices for tomato paste that year and because Respondent had a shorter processing season, which began on July 22, rather than in early July as is normally the case.

11. Customers

During the 1992 tomato season, Harter, Inc. had 60 customers, many of whom were brokers who in turn sold to industrial users of tomato paste who used the paste as an ingredient in the ultimate food product such as ketchup, salsa, soup, and spaghetti sauce. In any given season, these industrial users of tomato paste commonly use multiple sources of industrial tomato paste so as to insure a reliable supply of paste. Using a sales force of three people to sell its product both to brokers and directly to end users, Harter, Inc. contracted with its customers on a yearly basis. None of the three sales people are currently employed by Respondent.

During the 1993 season, Respondent had a total of 12 customers for its industrial tomato paste, of whom 7 had been customers of Harter, Inc. in the 1992 tomato season, plus another one who had purchased a company that had been a customer of Harter, Inc. in the 1992 season. One other customer made a one-time only purchase for experimental purposes. During the 1994 season, Respondent had approximately 30 customers, including new customers who did not previously do business with Harter, Inc.

Respondent sells through (not to) brokers to end users, and directly to end users. Like Harter, Inc., Respondent contacts with its customers on a yearly basis and sells only to the end users of the industrial tomato paste. Unlike Harter, Inc., Respondent does not employ a sales force to sell its product. Instead, it uses a brokerage that takes a percentage basis of each sale.

Respondent did not assume any customer contracts of Harter, Inc. d/b/a Harter Pik'd Rite, but made its own arrangements with all customers, including former Harter, Inc. customers. The terms of Respondent's contracts with its customers vary from customer to customer as was true with the customer contracts of Harter Pik'd Rite. Respondent did not give any preferential treatment to former customers of Harter, Inc. d/b/a Harter Pik'd Rite. Finally, Respondent did not assume any liability of Harter, Inc. nor any of Harter, Inc.'s accounts receivable.

12. Demand for recognition and results

On or about July 26, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of unspecified employees and bargain with it collectively as the exclusive bargaining representative of Respondent's employees. As of July 26, Respondent employed 66 hourly employees in production and maintenance, of which 43 employees were former employees of Harter, Inc. Respondent refused to recognize the Union as the exclusive bargaining representative of its employees nor did it begin bargaining with the Union. Instead, on August 10, Respondent filed an RM petition in Case 20–RM–2792 (exh. L). This petition has been held in abeyance pending resolution of the unfair labor practice charge leading to the instant case.

The Union seeks to represent a bargaining unit described as follows:

> All regular full-time, regular part-time and regular seasonal employees engaged in tomato processing and maintenance at the Employer's facility located at 1321 Harter Road, Yuba City, California 95992, excluding all other employees, temporary employees, casual employees, office clericals, confidential employees, guards and supervisors as defined in the Act.

[5] During the 1993 season, Respondent's customers were responsible for the transportation of finished tomato past products.

B. *Analysis and Conclusions*

1. Applicable legal principles

The issue in this case concerns successorship. As the Board noted in *Hendricks-Miller Typographic Co*., 240 NLRB 1082, 1083 fn. 4 (1979):

> The concept of ''successorship'' as considered by the United States Supreme Court in *NLRB v. Burns International Security Services, Inc*., et al., 406 U.S. 272 (1972) and its progeny, contemplates the substitution of one employer for another, where the predecessor employer either terminated its existence or otherwise ceases to have any relationship to the ongoing operations of the successor employer.

The underlying basis for this doctrine is to promote industrial peace, ''by forestalling the employees frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union.'' *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1366 (4th Cir. 1995).

As the facts of this case make clear, Harter, Inc. was a member of the mutliemployer association, California Processors, Inc., and authorized CPI to represent it in negotiating and administering collective-bargaining agreements with the IBT Council. The facts further make clear that the Union, both before and after its merger with Local 857, is a member of the IBT Council. Finally, CPI and the IBT Council entered into a series of collective-bargaining agreements, the most recent of which was effective for the term July 1, 1991, to June 30, 1994, and found in the record as exhibit C-1. All agree that Harter, Inc. was bound to the terms of exhibit C-1. All further agree that on July 26 the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of unspecified employees and bargain with it collectively as the exclusive bargaining representative of Respondent's employees (exh. K). Because Respondent refused the Union's demand, this controversy resulted.

In *CitiSteel USA*, 312 NLRB 815 (1993), the Board stated ''an employer succeeds to the collective-bargaining obligation of another employer if (1) a majority of its employees had been employed by the predecessor, and if (2) similarities between these two operations manifest a 'substantial continuity' between those enterprises.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41, 43 (1987), citing inter alia *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972).

2. Application of law to facts

a. *Were a majority of Respondent's employees previously employed by Harter, Inc.?*

The Union purports to represent Respondent's 66 P & M employees. Of this group, the parties agree, 43 employees were formerly employed by Harter, Inc. (stipulation par. 16.0).[6] Despite the apparent majority status under the Board's *CitiSteel, Inc*. rule quoted above, Respondent contends that the requisite test has not been met.

To support its argument, Respondent claims that the 43 employees were only a small portion of the 1200 bargaining unit employees formerly employed directly by Harter, Inc. and an even more miniscule fraction of the 14,000 employee-members in the multiemployer bargaining unit to which Harter, Inc. had belonged (Br. 19–20).

As to the claim that I should somehow look to the 14,000 employees in the multiemployer bargaining unit, I find such a claim frivolous as that number has no effect on Respondent's successorship status.[7] As to the difference between the 43 employees now employed by Respondent compared to the 1200 formerly employed by Harter, Inc., I note that Harter, Inc. employed approximately 1200 persons for its peach, prune, whole canned tomato, and industrial tomato paste operations. Currently, Respondent operates only one of these divisions, the industrial tomato paste operation. In *Louis Pappas' Homosassa Springs Restaurant*, 275 NLRB 1519, 1519–1520 (1985), the Board stated:

> [S]uccessorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation.

(In *Louis Pappas' Homosassa Springs Restaurant*, supra, the predecessor operated hotels, attraction park, and bait store, whereas the successor-respondent is principally engaged in operating a restaurant.) See also *Steward Granite Enterprises*, 255 NLRB 569 (1981); *Hydrolines, Inc*., 305 NLRB 416, 421–423 (1991); *School Bus Services*, 312 NLRB 1 (1993); *NLRB v. Band-Age, Inc*., 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921 (1976).

Respondent also contends that because the Union's demand letter of July 26 (exh. K) failed to specify the unit it sought to represent, the demand is somehow rendered ineffective. Such an argument would exalt form over substance.[8]

[6] When Respondent began its tomato paste operation on July 22, it employed 56 P & M employees (stipulation, par. 10). Then at the peak of the 1993 season, Respondent employed approximately 70–75 P & M employees. Of this group, about 50 were formerly employed by Harter, Inc. and were represented by the Union in their former employment (stipulation, par. 11.4).

[7] Cf. *El Cerrito Mill & Lumber Co*., 316 NLRB 1005 (1995).

[8] The Union's demand letter reads as follows:

July 26, 1993

Gerald Harter
Harter Tomato Products Company
1321 Harter Road
Yuba City, CA. 95993

Re: *Cannery Workers Local 849*
(Demand for Recognition and Bargaining)

Dear Mr. Harter:

Cannery, Dried Fruit and Nut Workers Union, Local 849 hereby demands recognition by Harter Tomato Products Company. The Union wishes to commence bargaining immediately and requests that you provide us with several dates during which you or the Company's representative can meet for contract negotiations.

Please respond to this demand in writing no later than 4 p.m. on Tuesday, July 27, 1993. You may forward your response by facsimile to (916) 533-5502. If the union does not hear from you by the date and time listed above, we will assume that the Company declines recognition and refuses to bargain.

Continued

It is clear the Union sought to represent the same P & M unit it previously represented at Harter, Inc. Respondent was not misled or prejudiced by the Union's omission. About 2 weeks later, on August 10, Respondent filed an RM petition (exh. L) describing the unit in question exactly as described in the stipulation, paragraph 16.3, which recites the bargaining unit that the Union seeks to represent. (The charge in this case was filed on August 11.)

In sum, I find that as of July 26, Respondent employed a substantial and representative complement of P & M employees. *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1287 (6th Cir. 1989).

b. *Does the business operation of Respondent represent ''substantial continuity'' of the business operation of Harter, Inc.?*

To answer this question, I return to the case of *CitiSteel USA*, supra, 312 NLRB at 815, where the Board stated:

> The factors to look to in determining whether there is substantial continuity were summarized by the Supreme Court in *Fall River*, supra at 43, as follows:
>
> > [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.
> >
> > These factors are to be assessed primarily from the perspective of the employees. Thus, the question is ''whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.''' Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

There is no question that Respondent performs the same business in at least one respect as did Harter, Inc. Moreover, the production process for industrial tomato paste remains the same. I note that all members of Respondent's administrative team had all worked for Harter, Inc., four of whom were high level manager and supervisors. Respondent's P & M employees perform essentially the same tasks as they did for Harter, Inc., although I note that Respondent has provided cross-training so employees can substitute for others as required. On this point, the Board in *CitiSteel USA* held, supra at 815:

> This change means that each employee now performs several job functions which had been covered by separate job classifications at Phoenix. While we find that this consolidation of function may require employees to perform some additional tasks, each one also continues mainly to perform work he had performed for Phoenix. When employees continued to perform substantially the same work that they did for the predecessor, the addition of some new job duties is not likely to change the employees' attitude toward their job to such an extent that it will defeat a finding of continuity of enterprise. [Footnote omitted.]

At least some of the grower-suppliers used by Respondent are the same as used by Harter, Inc. The fact that contract terms may differ is of no significance. In 1993 Respondent used the same ATL Trucking concern used by Harter for all or most of its transportation requirements. The change in truck companies for 1994, a few months after the complaint was issued, is of no significance. Respondent sells its product to many of the same customers of Harter, Inc.

In considering the question of successorship, I must also consider those factors that tend to indicate that a successorship does not exist.

> While there is no single factor that will negate a finding of successorship, the Board has emphasized such combined factors as (1) a long hiatus in the resumption of operations; (2) a difference in location of the resumed operation; (3) a changeover in the supervisory hierarchy; (4) the absence of a carry-over of customers or markets supplied; and (5) a difference in the scale of the operations and the products produced, and in the methods of productions. These factors, in various combinations are sometimes found in circumstances where the change in the employment relationship was not the result of a sale of the business as an ongoing enterprise, and where the employees had no reasonable basis for any expectation that their employment would be resumed at the same location. The existence or nonexistence of such factors may also be relevant to the employees' desires for continued representation. [Footnotes omitted.]

I Developing Labor Law 804 (Hardin Ed., 3rd Ed. 1992).

In the instant case, there was no hiatus at all; location remained the same; supervisors apparently remained the same (now called the administrative team); customers and markets remained substantially the same; finally, the scale of Respondent's business and the products produced have been reduced from those which existed under Harter, Inc., but the method of production for the industrial tomato paste remained essentially the same.

In light of the above facts and conclusions, I find that Respondent is a successor to Harter, Inc., because the facts reflect ''substantial continuity'' between Respondent and Harter, Inc. As stated by the court in *Holly Farms Corp. v. NLRB*, supra, 48 F.3d at 1367.

> In view of that continuity, the employees would ''understandably view their job situations as essentially unaltered,'' and could reasonably be expected to continue their support for the Union. *Fall River*, 482 U.S. at 43; accord *General Wood Preserving Co.*, 905 F.2d at 819; *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1364–66 (10th Cir. 1992); cf. *NLRB v. Dent*, 534 F.2d 844, 846 fn. 2 (9th Cir. 1976).

Sincerely,
/s/ Robert Adams
ROBERT ADAMS
Secretary-Treasurer
[exh. K]

Under Board law, this letter is an effective demand. *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995); *Hydrolines, Inc.*, supra at 420.

See also *Banknote Corp. of America*, 315 NLRB 1041, 1042 (1994).

I further find that by failing to recognize and to bargain with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.[9]

CONCLUSIONS OF LAW

1. Respondent Harter Tomato Products Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a successor employer to Harter, Inc. d/b/a Pik'd Rite.

3. The Union, Cannery, Dried Fruit and Nut Workers' Union, Local 849, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Since July 22, the Union has been the exclusive bargaining representative of Respondent's employees in the following unit:

> All regular full-time, regular part-time and regular seasonal employees engaged in tomato processing and maintenance at the Respondent's facility located at 1321 Harter Road, Yuba City, California 95992, excluding all other employees, temporary employees, casual employees, office clericals, confidential employees, guards and supervisors as defined in the Act.

5. Since July 26, Respondent has failed and refused to recognize and bargain with the Union in the unit set forth above, in violation of Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Harter Tomato Products Company, Yuba City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Cannery, Dried Fruit and Nut Workers' Union, Local 849, International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of its employees employed at the Yuba City, California facility in the appropriate unit set forth below:

> All regular full-time, regular part-time and regular seasonal employees engaged in tomato processing and maintenance at the Respondent's facility located at 1321 Harter Road, Yuba City, California 95992, excluding all other employees, temporary employees, casual employees, office clericals, confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of all the employees employed at Yuba City, California, in the unit described above.

(b) Post at its business facility located at Yuba City, California, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] In agreement with General Counsel, br. 2–3, I find that Respondent's RM petition (exh. L), filed after Respondent violated the Act by refusing to recognize and to bargain with the Union, is fatally tainted and need not be further considered. See *First Food Ventures*, 229 NLRB 1228, 1230 (1977); *NLRB v. Williams Industries*, supra, 50 F.3d 1284–1285.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with Cannery, Dried Fruit and Nut Workers' Union, Local 849, International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate unit with regard to wages, hours, working conditions, and other terms and conditions of employment:

> All regular full-time, regular part-time and regular seasonal employees engaged in tomato processing and maintenance at our facility located at 1321 Harter Road, Yuba City, California 95992, excluding all other employees, temporary employees, casual employees, office clericals, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described aobve, with regard to their wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

HARTER TOMATO PRODUCTS COMPANY